

1 Steve W. Berman (*pro hac vice*)  
2 Mark S. Carlson (*pro hac vice*)  
3 Jerrod C. Patterson (*pro hac vice*)  
4 HAGENS BERMAN SOBOL SHAPIRO LLP  
5 1301 Second Avenue, Suite 2000  
6 Seattle, WA 98101  
7 Telephone: (206) 623-7292  
8 Facsimile: (206) 623-0594  
9 steve@hbsslaw.com  
10 markc@hbsslaw.com  
11 jerrodp@hbsslaw.com

12 *Attorneys for Plaintiffs*  
13 *Additional Counsel Listed on Signature Page*

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 OAKLAND DIVISION

17 REARDEN LLC, REARDEN MOVA LLC,  
18 Plaintiffs,  
19  
20 v.

21 WALT DISNEY PICTURES, a California  
22 corporation, MARVEL STUDIOS, LLC a  
23 Delaware limited liability company, MVL  
24 PRODUCTIONS LLC, a Delaware limited  
25 liability company, CHIP PICTURES, INC., a  
26 California corporation, INFINITY  
27 PRODUCTIONS LLC, a Delaware limited  
28 liability company, ASSEMBLED  
29 PRODUCTIONS II LLC, a Delaware limited  
30 liability company,

31 Defendants.

Case No. 4:17-cv-04006-JST

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION IN LIMINE  
EXCLUDING DARREN HENDLER  
OPINIONS UNDER FRE 702**

**REDACTED PUBLIC VERSION**

Date: October 27, 2023  
Time: 2:00 p.m.  
Judge: Hon. Jon S. Tigar  
Ctm.: 6 (2nd Floor)

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 27, 2023, at 2:00 p.m., or as soon as the matter may be heard, in Courtroom 6 (2nd Floor) of the above-captioned Court, Plaintiffs will and hereby do move for an Order to exclude the testimony in the highlighted excerpts from the declaration of Darren Hendler attached as Exhibit A to the Declaration of Mark Carlson and corresponding testimony in the Hendler deposition transcripts attached thereto as Exhibit B, filed concurrently with this notice. Plaintiffs make this motion pursuant to FRE 702 and 403, and FRCP 26(a)(2). This Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the Declaration of Mark Carlson; all pleadings on file; and any other document or argument submitted at or prior to the hearing on this Motion.

DATED: September 15, 2023

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Mark S. Carlson

MARK S. CARLSON

Steve W. Berman (*pro hac vice*)

Jerrold C. Patterson (*pro hac vice*)

1301 Second Avenue, Suite 2000

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

steve@hbsslaw.com

markc@hbsslaw.com

jerrodp@hbsslaw.com

Rio S. Pierce, CBA No. 298297

Gayne Kalustian-Carrier, CBA No. 336814

HAGENS BERMAN SOBOL SHAPIRO LLP

715 Hearst Avenue, Suite 300

Berkeley, CA 94710

Telephone: (510) 725-3000

Facsimile: (510) 725-3001

riop@hbsslaw.com

gaynek@hbsslaw.com

*Attorneys for Plaintiffs*

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Rearden seeks to exclude purported expert opinions of Darren Hendler, a former employee at Digital Domain 3.0 (“DD3”).<sup>1</sup> Disney seeks to offer Hendler’s comparison of photos and videos under the guise of expert opinion, even though he candidly and repeatedly acknowledged in deposition that his opinion required no special expertise and a layperson could conduct the same comparisons. If admitted, this testimony will unduly prejudice the jury on an ultimate issue in the case. Rearden’s motion based on FRE 702 and 403 should be granted.

### II. FACTS

#### A. Disney’s expert “disclosure” of Darren Hendler did not comply with Rule 26(a)(2).

On April 20, 2023, *after Mr. Hendler had been deposed twice and fact discovery had closed*, Disney produced an ambiguous “expert disclosure” that stated as follows (Ex. C at 1):

Based on the information presently known to them, Defendants expect that Mr. Hendler’s testimony will be based on his knowledge as a percipient witness. However, to the extent Mr. Hendler’s testimony is deemed to be subject to Federal Rule of Evidence 702, 703, or 705, Defendants expect Mr. Hendler to testify regarding visual effects services in connection with Beauty and the Beast and other motion pictures and the studio’s involvement with the same; the extent to which the Mova Contour System and Mova Contour Software were used in visual effects work on Beauty and the Beast; and the extent to which the Mova Contour System and Mova Contour Software contributed to the visual effects that appeared in Beauty and the Beast. Defendants expect Mr. Hendler’s testimony will encompass the topics addressed in his Declaration in Support of Defendants’ Summary Judgment Motion (ECF No. 249) and his depositions dated June 12, 2020 and February 16, 2023.

The Court has identified Hendler as “Defendants’ expert witness. ECF No. 482 at 3:19-26. Hendler did not submit any written report conforming to FRCP 26(a)(2) in this litigation.

---

<sup>1</sup> The specific portions are highlighted in the excerpts of the Declaration of Darren Hendler attached as Exhibit A to the Declaration of Mark Carlson, and the corresponding testimony in the excerpts from the Hendler depositions attached as Exhibit B.

**B. Hendler’s summary judgment declaration included opinions that were not based on the facts of the case and were admittedly within the competence of any lay juror.**

Disney seeks to rely on Hendler’s “expert” opinion, but he was not substantively involved with MOVA Contour facial capture or processing. Hendler was the Digital Effects Supervisor for DD3’s work on *Beauty and the Beast*, which included supervising the process by which the CG Beast character was animated. [REDACTED]

Consequently, when asked if he was familiar with how the MOVA team worked at all, Mr. Hendler could answer only “somewhat, yes.” Hendler I Tr. 10:23-25. He did not know the names of the people on the MOVA team or how many there were. Hendler II Tr. 170:9-16. When asked if the director of the film, Bill Condon, directed the MOVA facial capture sessions, he testified “I wasn’t there for those performances. I can’t say exactly.” Hendler I Tr. 11:5-11. He did not know whether Mr. Condon or someone from the production company made selects from the different “takes” of each shot. *Id.*, 11:22-12:9. He did not know who was responsible for capturing the actor’s performance and processing the data. *Id.*, 13:10-11; 14:6-19. [REDACTED]

[REDACTED] Mr. Hendler admitted that he is not an expert on and had no specialized education in MOVA Contour, and had never set up the physical MOVA Contour apparatus. Hendler II Tr.

1 155:5-9; 156:13-15; 157:3. And he has not used MOVA Contour software to process facial  
2 performance capture data. *Id.*, 157:20-25. To prepare for his deposition, he had to call Mr. LaSalle  
3 to learn how MOVA Contour processing works. *Id.*, 135:16-137:21; 157:5-19.

4 Despite this lack of knowledge of MOVA Contour, Mr. Hendler submitted a declaration in  
5 support of Disney's causal nexus summary judgment motion purporting to explain how Mr. LaSalle  
6 and the MOVA team did its job, relying on his "understanding" of what they did. Hendler Dec. ¶¶15-  
7 16. But this "understanding" came primarily from Mr. LaSalle. *Id.*, ¶18. And he claimed to know  
8 what visual effects artists did with the MOVA Contour video from the captured sessions contrary to  
9 his deposition testimony. *Id.*, 62.

10 Mr. Hendler also offered a number of opinions that were based on simply visually comparing  
11 two frames from a shot in the film in an effort to minimize the impact of MOVA Contour on the  
12 Beast's appearance. In support of Disney's position, [h]e opined that "the impact of the MOVA  
13 output on the final appearance of the Beast in such shots was negligible" based on his visual  
14 comparison of them. Hendler Decl. ¶1-6; Hendler II Tr. 172:16-173:4; 174:6-20; 175:9-16. He  
15 admitted that this comparison could have been performed by anyone, and agreed that his opinion  
16 required no particular expertise. *Id.* 181:2-183:3.

17 For example, he compared two frames of the Beast's face (Figures 7 and 8), and opined that  
18 in one "the inner brows and eyes have been changed to give a more shocked and sad expression and  
19 the mouth has been opened wider and dropped down." Hendler Decl. ¶69. He also relied on video  
20 from the scene in which the frames were taken (Tr. Exhibit 242, 243; 262:3-264:14). But he applied  
21 no tests or methods that are generally accepted in the visual effects field to detect these differences,  
22 and he conceded that any lay juror would have been able to see the differences. *Id.* 265:7-266:1;  
23 266:16-25; 267:2-271:8.

24 He also visually compared video of Dan Stevens performing as the Beast in the MOVA  
25 Contour rig with video of him performing the same scene on the set, and opined on the differences  
26 he observed. Hendler Decl. ¶70; Hendler II Tr. 271:10-273:6. But he conceded that any lay juror  
27 could make that observation without his assistance. *Id.*, 273:3-12. He similarly compared MOVA  
28

1 facial capture video with video produced by his animation team, and opines on the visual differences.  
 2 Hendler Decl. 107-108 and Fig. 10; Hendler II Tr. 285:8-286:11. He once again conceded that a lay  
 3 juror could make the same comparison. *Id.*, 286:12-19. Mr. Hendler made another comparison of  
 4 Mr. Stevens in two screenshots, and offered similar opinions regarding differences. *Id.*, 295:15-  
 5 297:5. But he conceded that anyone could make that comparison without his assistance. *Id.*, 297:10-  
 6 14. Finally, Mr. Hendler compared MOVA Contour capture frames and video to shots produced by  
 7 his animators, and observed that the animation more closely resembled the performance on the set.  
 8 Hendler Decl. ¶113, Ex. 51. But he acknowledged that a lay person could see the differences  
 9 between the shots. Hendler II Tr. 303:20-305:12.

### 10 III. ARGUMENT AND AUTHORITY

#### 11 A. Mr. Hendler's opinions that do not require specialized skill or experience and are within 12 the competence of a lay jury should be excluded under FRE 702.

13 An expert witness may testify in the form of an opinion or otherwise only “if . . . the expert’s  
 14 scientific, technical, or other specialized knowledge *will help the trier of fact* to understand the  
 15 evidence or to determine a fact in issue[.]” Fed. R. Evid. 702(a). Here, no expert knowledge is required  
 16 to make the visual comparisons between frames or between videos cited in Hendler’s declaration.  
 17 Directly on point is *U.S. v. Brown*, 501 F.2d 146 (9th Cir. 1974), judgment rev’d on other grounds, 422  
 18 U.S. 225 (1975). In that case, an FBI agent testified as an expert that the surveillance photos of two  
 19 suspected bank robbers were the same as the suspects’ mugshots. *Id.* at 148. The Ninth Circuit found  
 20 error, holding that the similarity of the photographs is a question of common sense and not expert  
 21 opinion. *Id.* Such lay opinion is properly excluded when it invades the province of the jury. *See*  
 22 *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 2018 WL 6511146, at \*3 (N.D. Cal. Dec. 11, 2018)  
 23 (applying FRE 702 and excluding expert testimony that would “merely substitut[e] the expert’s  
 24 judgment for the jury’s”).

25 Mr. Hendler’s opinions based on visual comparison of two frames from a shot in the film are  
 26 not admissible because they encompass matters committed to the jury. His opinion on the “negligible”  
 27 impact of MOVA’s output based on his visual comparison of two or more images, or images and video,  
 28 is one that the jury is as competent to make as he is. Hendler Decl. ¶1-6; Hendler II Tr. 172:16-173:4;

1 174:6-20; 175:9-16. Whether the images were, in fact, similar or different does not require expertise  
 2 of any kind, and therefore his opinions on matters any lay juror is competent to form based on her or  
 3 his own examination of the evidence is not helpful to “the trier of fact to understand the evidence or to  
 4 determine a fact in issue.” Hendler admitted as much. *Id.* 181:2-183:3. For example, his opinion on  
 5 differences in the Beast’s emotional expressions in Figures 7 and 8 of his declaration are opinions that  
 6 anyone can reach without specialized knowledge or training. As recounted above, he concedes that a  
 7 lay person could do the same comparisons he did. *See supra* Part II.B. His opinions accordingly do  
 8 not meet the standard for FRE 702.

9 **B. Mr. Hendler’s prejudicial expert testimony should be excluded because it will confuse the**  
 10 **jury and inhibit it from making its own determinations based upon the evidence.**

11 The prejudice to Rearden is self-evident: Mr. Hendler is endowing an opinion within the  
 12 competence of any juror with the penumbra of his expertise. *See* FRE 403. Expert opinions require  
 13 special care because “[j]uries are likelier to credit experts, who are perceived to possess special  
 14 relevant knowledge and are expected to help the jury reach the right conclusion, more than simple  
 15 documentary evidence.” *Apple, Inc. v. Samsung Elec. Co.*, 2014 WL 794328, at \*9 (N.D. Cal. Feb.  
 16 24, 2015).

17 Hendler’s testimony runs the same unacceptable risk. He offers himself as an expert in visual  
 18 effects, but his opinions are based on common sense that is prejudicial and confusing for the jury.  
 19 *See Topliff v. Wal-Mart Stores East LP*, 2007 WL 911891, at \*16 (N.D.N.Y. Mar. 22, 2007)  
 20 (excluding “common sense” opinion because it would “confuse and prejudice” the jury).

21 **IV. CONCLUSION**

22 For the foregoing reasons, Mr. Hendler should not be permitted to testify as an expert on the  
 23 portions of his declaration highlighted in Exhibit A and the corresponding testimony highlighted in  
 24 Exhibit B to the Declaration of Mark Carlson.

25 DATED: September 15, 2023

HAGENS BERMAN SOBOL SHAPIRO LLP

27 By: /s/ Mark S. Carlson

MARK S. CARLSON

Steve W. Berman (*pro hac vice*)

1 Jerrod C. Patterson (*pro hac vice*)  
2 1301 Second Avenue, Suite 2000  
3 Seattle, WA 98101  
4 Telephone: (206) 623-7292  
5 Facsimile: (206) 623-0594  
6 steve@hbsslaw.com  
7 markc@hbsslaw.com  
8 jerrodp@hbsslaw.com

6 Rio S. Pierce, CBA No. 298297  
7 Gayne Kalustian-Carrier, CBA No. 336814  
8 HAGENS BERMAN SOBOL SHAPIRO LLP  
9 715 Hearst Avenue, Suite 300  
10 Berkeley, CA 94710  
11 Telephone: (510) 725-3000  
12 Facsimile: (510) 725-3001  
13 riop@hbsslaw.com  
14 gaynek@hbsslaw.com

12 *Attorneys for Plaintiffs*